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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

JAROSLAV MARIK et al., Plaintiffs and Appellants, v. CAROLE EGLASH, Defendant and Respondent.	B227272 (Los Angeles County Super. Ct. No. SC097395)

APPEAL from a judgment of the Superior Court of Los Angeles County. John H. Reid, Judge. Affirmed.

Law Office of Joseph J.M. Lange, Joseph J.M. Lange; Benedon & Serlin, Gerald M. Serlin and Douglas G. Benedon for Plaintiffs and Appellants.

DeCastro, West, Chodorow, Mendler, Glickfeld & Nass, Inc. and Jerry L. Kay for Defendant and Respondent.

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The issue on appeal is whether the trial court erred in finding the plaintiffs' accountant malpractice action to be barred by the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1). We find no error and affirm the judgment.

FACTUAL AND PROCEUDRAL BACKGROUND

Background

In or about 1995, plaintiffs and appellants Jaroslav Marik, M.D. and Letkov Financial Partners, LP (collectively Marik) invested capital and lent money to University Village, LLC (UV), an entity created to develop land for residential and commercial uses near the University of California at Riverside. Marik and four other individuals became members of UV, including Peter Henman-Laufer. UV was initially managed by Southland Land Corporation (Southland), which acquired vacant land and then subdivided it into parcels, with title to each parcel being held by a separately formed limited liability company (the UV Entities) (e.g., UV-B held title to parcel B, etc.).

In 2002, two new limited liability companies were created known as University Housing, LLC (UV-H) and University Village Building K, LLC (UV-K) (collectively the Marik Entities). The purpose of the Marik Entities was to raise capital to acquire parcels K, L and M from the UV Entities. Between 2002 and February 2004, Marik invested $500,000 into UV-K for construction of an office building and $1 million into UV-H for construction of student dormitories. Neither UV-K nor UV-H ever acquired any land from the UV Entities, and Marik's $1.5 million capital investment was transferred to the UV Entities. Parcel K was sold in 2003 and parcels L and M were sold in November 2004, with all sales proceeds going to the UV Entities.

Meanwhile, in the summer of 2004 the members of the UV Entities held a meeting in which they expressed concerns about the state of their investments. Marik told the other members that his investments in UV-K and UV-H were a "loss." Both before and after this meeting, Marik had a personal attorney and a tax accountant advising him on matters relating to his investments in UV-K and UV-H.

Also in 2004, the members became dissatisfied with Southland as manager of the UV Entities, and replaced it with Moravan Management, Inc., a corporation controlled by Henman-Laufer. Moravan hired respondent Carole Eglash as the bookkeeper and tax-preparer for the UV Entities and UV-K, but not UV-H.

In July 2004, Eglash prepared and filed the 2003 tax returns for the UV Entities and UV-K, and Schedule K-1's for the individual members. In preparing the returns and schedules, Eglash relied on Southland's books and records, which Henman-Laufer and others told her were accurate. Eglash later realized there were inaccuracies in the tax records she had prepared, and began making inquiries in November 2004.

In March 2005, Marik sued Henman-Laufer, Jerry L. Kay, the attorney for UV, and others for fraudulently inducing his investments. Three months later he sued UV and the UV Entities for breach of contract and accounting. Marik continued to remain a member of UV.

On July 9, 2005, Eglash sent an e-mail to the members, including Marik, indicating that she did not intend to amend the 2003 tax return for UV-K. The e-mail stated: "The 2003 return for UV-K was prepared without a full awareness that the property had been sold in that year. The accounting records which Southland had maintained never reflected the sale. It was my intention to make all the necessary adjustments to reflect that sale on the 2004 return, thereby avoiding the necessity of members having to amend their personal returns as it relates to UV-K. Now, however, it seems that the issue regarding transfer of investment from UV-K to UV, LLC is in dispute and I would prefer to not file this return if the issue can be resolved in the next few months." Eglash concluded the e-mail by stating: "With the current legal situation it seems that any return filed would need subsequent amending. [¶] Therefore, with your joint concurrence, I will prepare additional extension forms which will give us until 17 October 2005 to file. In the absence of such concurrence I would like guidance on what positions to take regarding these issues at this time."

On August 26, 2005, Eglash sent a memorandum to all members, entitled "An Analysis of the Events Relating to UV-K, LLC." She ended the memorandum by stating:

"To avoid amending the 2003 return necessitating each member to amend their personal returns we will correct the records as of 1/1/04."

In September 2005, Marik's tax accountant, Ward Nyhus, Jr., who was also Marik's accounting expert at trial, sent an e-mail to attorney Kay stating: "I am the certified public accountant of Dr. and Mrs. Marik. I am writing to request the information statement or statements pertaining to their interests in the entity known as 'Building K.' Mr. Henman-Laufer has requested that we ask you about when we may expect the information relating to the operations of the Building K entity during 2004. [¶] There are only two remaining weeks before the 2004 tax returns of Dr. and Mrs. Marik must be filed." Kay responded that he did "not know anything about the accounting as Peter Henman-Laufer and Carole Eglash are handling that matter." Marik testified that in December 2005, Eglash informed him that she had been instructed not to provide him with any tax information, as a result of his lawsuits.

In February 2006, Eglash wrote to Henman-Laufer and Kay, stating that she had gone back through the accounting records from 2002 and there had clearly been comingling of money.

On June 1, 2006, Eglash sent an e-mail to Henman-Laufer and Kay stating: "When the 2003 UV-K, LLC tax return was done it was done with a lack of understanding or research as to what events had taken place. Now that we have agreed that the actual paperwork does not support the contention that justifies that no sale of land from UV, LLC to UV-K occurred and that [the] rationale for UV-K, LLC vanishes, I believe we should amend the 2003 return and treat investment by Marik . . . as loans to UV, LLC." Marik did not receive the e-mail at that time. That same day, Eglash sent an e-mail to Henman-Laufer stating, "I suggest we just continue to muddle through doing the best we can given the paper trail that exists. This would include filing of the Secretary of State form, tax returns, etc."

In early June 2006, Marik's wife inquired about the status of the UV-K tax returns. On June 16, 2006, Henman-Laufer sent an e-mail to Eglash asking her to respond. When asked at trial whether, as of June 16, 2006, he "had not instructed Ms. Eglash to not

provide tax returns to the Mariks," Henman-Laufer testified: "I think Mrs. Eglash was uncomfortable in just how to prepare the tax returns so it was not only an instruction of mine. I think she just was not satisfied with being able to prepare the tax returns." Eglash never filed an amended return for the 2003 tax year. While she did file a return for UV for the 2004 tax year, she did not prepare a return for UV-K or Schedule K-1 for the 2004 tax year.

Procedural History

On March 7, 2008, Marik filed this accountant malpractice complaint against Eglash.[1] The complaint alleged the following: Eglash entered into an "accountant-client relationship" with UV, UV-K and UV-H and their members "for the purposes of performing bookkeeping and accounting functions and preparing tax returns"; Marik invested $1.5 million in UV-K and UV-H; Eglash "tortuously and otherwise negligently represented" Marik by concealing from him that his investments "were total losses"; Eglash prepared tax returns and schedule K-1 forms that did not reflect these losses; Marik did not discover "the foregoing" until August 6, 2007 when Eglash gave deposition testimony in Marik's other lawsuits that "in or about 2004" she refused to prepare tax returns for UV-K "due to the improper activities of its managers" and because Marik's investment "had been illegally commingled with the assets of other separate and distinct activities"; and Marik was harmed because he filed tax returns that did not reflect his losses, "causing him to suffer an unnecessarily high tax liability," and he did not have an opportunity to timely amend his returns to reflect his losses.

After Eglash unsuccessfully moved for summary judgment, the case proceeded to bench trial in February 2010. The court ruled in favor of Eglash, finding the action was

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[1] On November 18, 2008, Marik filed an amended complaint joining his wife and Letkov Financial Partners, LP as plaintiffs.

barred by the two-year statute of limitations in Code of Civil Procedure section 339, subdivision (1).[2] This appeal followed.

DISCUSSION

Marik contends that his malpractice lawsuit is not time-barred because he discovered Eglash's alleged negligence and suffered actual injury within two years of filing his complaint. We disagree.

I. Relevant Law

In an action for accountant malpractice, the statute of limitations "begins to run when (1) the aggrieved party discovers the negligent conduct causing the loss or damage and (2) the aggrieved party has suffered actual injury as a result of the negligent conduct." (*Apple Valley Unified School Dist. v. Vavrinek, Trine, Day & Co.* (2002) 98 Cal.App.4th 934, 942 (*Apple Valley*), citing *International Engine Parts, Inc. v. Feddersen & Co.* (1995) 9 Cal.4th 606, 608 (*Feddersen*).)

"Under the discovery rule, the statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing, that someone has done something wrong to her. . . . A plaintiff need not be aware of the specific 'facts' necessary to establish the claim; that is a process contemplated by pretrial discovery. . . . So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her." (*Jolly v. Eli Lilly & Co.* (1988) 44 Cal.3d 1103, 1110–1111, fn. omitted.) These principles apply in accounting malpractice actions. (*Apple Valley, supra*, 98 Cal.App.4th at p. 943, citing *Curtis v. Kellogg & Andelson* (1999) 73 Cal.App.4th 492, 501.)

Resolution of a statute of limitations issue is normally a question of fact. (*Jolly v. Eli Lilly & Co., supra*, 44 Cal.3d at p. 1112.) "The trial court's finding on the accrual of a cause of action for statute of limitations is upheld on appeal if supported by substantial

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[2] The trial court did not address whether Eglash was negligent.

evidence." (*Institoris v. City of Los Angeles* (1989) 210 Cal.App.3d 10, 17; *Enfield v. Hunt* (1984) 162 Cal.App.3d 302, 310.) When the facts are undisputed, review is de novo. (*Jolly v. Eli Lilly & Co., supra,* at p. 1112.) Under either standard, we find the judgment is correct.

II. Inquiry Notice

Despite Marik's claim that he was unaware of any wrongdoing by Eglash until her deposition testimony in August 2007, the evidence shows that Marik knew in the summer of 2004 that his $1.5 million investments in UV-K and UV-H were total losses, and that these losses were not reflected on the tax returns filed by Eglash in 2004 for the 2003 tax year. Marik also knew in 2004 that he did not receive a schedule K-1 for UV-K amending the 2003 return. Marik knew in 2005 that his losses were not reflected on the UV tax return filed by Eglash for the 2004 tax year. In March 2005, Marik filed lawsuits seeking to recover his losses. By July 2005, Marik knew from Eglash's e-mail that there were inaccuracies in the 2003 tax returns that needed to be amended, and that she was not going to file any amendment on behalf of UV-K or any tax return for UV-K for the 2004 tax year without further guidance. While Eglash sent a memorandum to the members in August 2005 indicating that she would "correct the records," Marik's own personal tax accountant was unsuccessful in obtaining any 2004 tax returns for UV-K when he inquired in September 2005. And by December 2005, Eglash informed Marik that she had been instructed not to provide him with any tax information as a result of his pending lawsuits.

We agree with Eglash that these instances, when taken together, demonstrate that in 2005, Marik should have known of the facts giving rise to his alleged damages upon which this action for negligence against Eglash is premised. It was incumbent upon him to "go find the facts; [he could not] wait for the facts to find [him]." (*Jolly v. Eli Lilly & Co., supra,* 44 Cal.3d at p. 1111.) Thus, the trial court correctly found that Marik was put on inquiry notice more than two years before he filed this accountant malpractice action on March 7, 2008.

We reject Marik's contention that the limitations period was tolled by Eglash's representations that she intended to amend the 2003 tax return and her failure to keep him adequately informed. Marik cites to Eglash's July 2005 e-mail to him and the other members as evidence of one of her representations. But in this correspondence Eglash stated that she did *not* intend to file an amended return unless instructed to do so. Marik does not cite any place in the record showing that Eglash was specifically instructed to file amended tax returns for UV-K. Indeed, Eglash testified that she lacked authority to file amended returns. Marik also cites to Eglash's August 2005 memorandum to the members, which she ended by stating, "we will correct the records as of 1/1/04." Marik points out that Eglash's own accounting expert testified that he had a right to rely on this statement. But by the following month Marik's own personal accountant got nowhere in trying to obtain UV-K tax information. And Marik himself testified that Eglash informed him in December 2005 that she could not provide him with tax information as a result of his lawsuits. Marik further testified that Eglash never directly communicated to him that she intended to amend the returns. We are satisfied that Marik has cited no evidence supporting tolling of the statute of limitations beyond the year 2005.

III. Actual Injury

We also find that Marik suffered actual injury more than two years before filing the instant action. To avoid this result, Marik argues that he did not suffer actual injury until the three-year period for amending the tax returns had passed, i.e., July 2007, because until that time any "potential loss" was speculative or contingent.[3] Marik relies on *Feddersen, supra*, 9 Cal.4th 606 to support his position, but that case is distinguishable.

Feddersen dealt with the situation in which a taxpayer paid too little tax and a deficiency existed. Our Supreme Court held that in such a situation, "The deficiency

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[3] Eglash's accounting expert testified that a federal taxpayer has three years to amend a return from the date the original return was filed.

assessment serves as a *finalization* of the audit process and the commencement of actual injury because it is the trigger that allows the IRS to collect amounts due and the point at which the accountant's alleged negligence has caused harm to the taxpayer." (*Feddersen, supra*, 9 Cal.4th at p. 617.) The Court reasoned that because the culmination of the IRS audit process was the point at which the IRS could collect funds from the taxpayer, the taxpayer's damages were no longer speculative or inchoate. (*Id.* at p. 620.) The Court also concluded that its bright-line rule "conserves judicial resources and avoids forcing the client to sue the allegedly negligent accountant for malpractice while the audit is pending," and "avoids requiring the client to allege facts in the negligence action that could be used against him or her in the audit." (*Ibid.*) If the limitations period commenced at an earlier date and the IRS later found no deficiency to exist, the taxpayer's damages would become moot after the needless expenditure of litigation expenses. (*Ibid.*)

Here, by contrast, Marik does not claim that he underpaid taxes and therefore a deficiency existed, but rather that he *overpaid* taxes as a result of Eglash's failure to show his investments as total losses, which prevented him from writing off the losses against capital gains in 2003 and subsequent years. But as Eglash notes, nothing prevented the IRS from collecting funds from Marik in 2004 based on the 2003 tax returns. Nor did anything prevent Marik from amending his returns in that or subsequent years or from filing a protective claim for a refund.[4] Unlike the taxpayer's damages when a deficiency exists, which remain speculative until the IRS issues a final assessment of the tax due, Marik's damages were not speculative when the 2003 return was filed in 2004. The timing of the IRS's acceptance or rejection of the taxes paid is irrelevant because Marik did not need to wait for any determination by the IRS before mitigating his losses. A

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[4] Eglash's accounting expert testified that a protective claim for a refund is "filed to protect claims on behalf of a taxpayer because the amount by which the tax return should be amended is unknown. This leaves a statute [of limitations] open more than three years, and one of the examples . . . is that sometimes there is litigation pending that would resolve the ambiguity. So this is basically an application to keep the three-year statute running."

finding that actual injury occurred at some later date therefore would not conserve judicial resources or satisfy public policy encouraging the mitigation of damages. Indeed, the *Feddersen* Court specifically rejected the definition of actual injury that would have delayed accrual of the statute of limitations until all administrative and judicial processes were exhausted or until the time the malpractice became "irremediable." (*Feddersen, supra*, 9 Cal.4th at p. 617 ["the date of deficiency assessment is not the point of 'irremediability' . . . because it is not equivalent to a final judgment"; a taxpayer has 90 days to file a petition for redetermination of the deficiency].)

DISPOSITION

The judgment is affirmed. Eglash is entitled to recover her costs on appeal.

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_____, Acting P. J.

DOI TODD

We concur:

_____, J.

ASHMANN-GERST

_____, J.

CHAVEZ